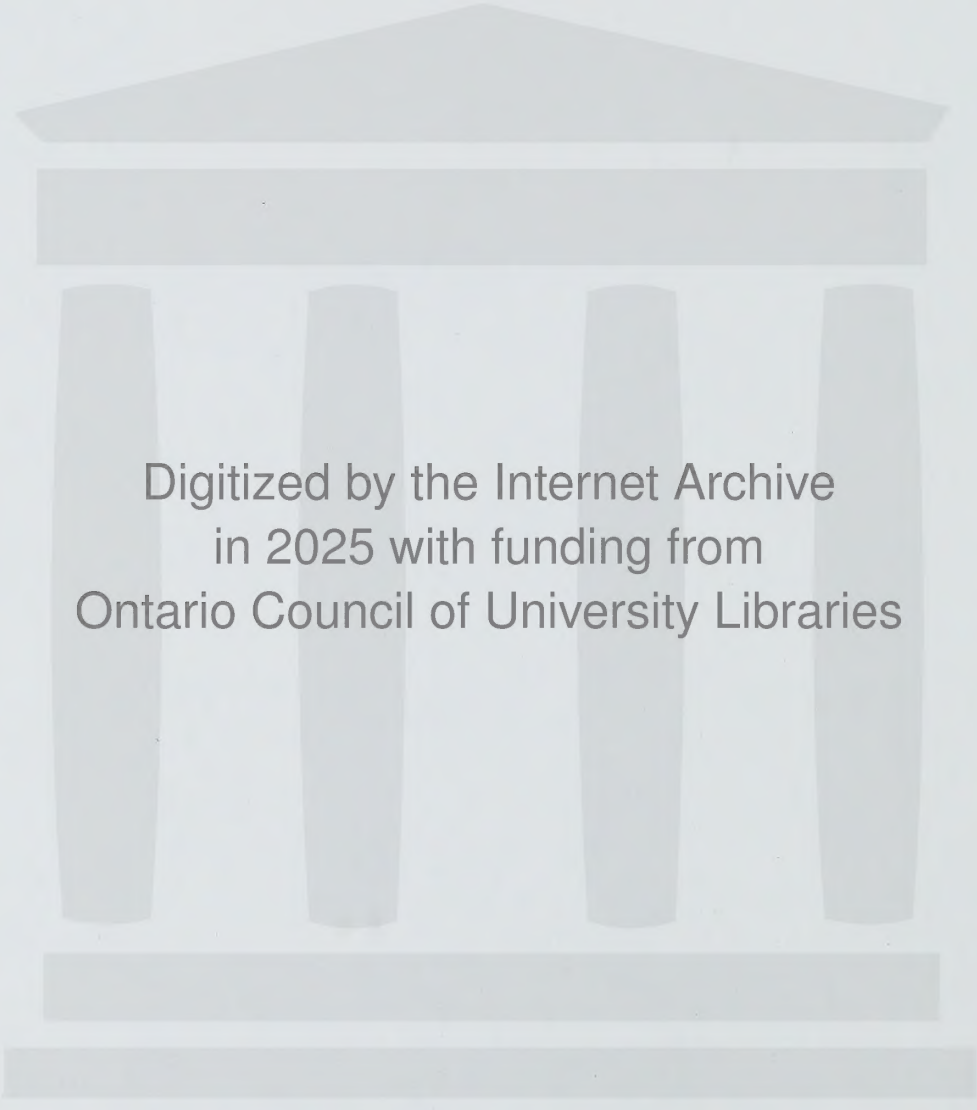
REPORT

OF THE ARBITRATION REVIEW COMMITTEE

TO THE

HONOURABLE BOB MACKENZIE, M.P.P.,

MINISTER OF LABOUR



Ontario Ministry of Labour
Ministère du Travail de l'Ontario

Office of the Minister
Bureau du Ministre

400 University Ave.
14th Floor,
Toronto, Ontario
M7A 1T7
416/326-7600

400, avenue University
14e étage,
Toronto (Ontario)
M7A 1T7
416/326-7600

November 8, 1991

I am pleased to provide you with a copy of the report of the Arbitration Review Committee, for your consideration.

As part of a careful review and analysis of the Labour Relations Act, a need was identified to review the current system of grievance arbitration in order to identify potential areas of reform. In September of this year I asked Kenneth P. Swan, an experienced arbitrator, to chair a committee to enquire into and examine the current system of grievance arbitration in Ontario and to recommend changes for improvement.

Mr. Swan was aided in his work by Jacqueline Campbell, Commissioner, Corporate Services, City of Scarborough, and Norman Carriere, Co-ordinator, Occupational Health and Safety, United Steelworkers of America, individuals familiar with the arbitration system from the employer and trade union perspective respectively. The Committee was assisted by James K.A. Hayes and B. Richard Baldwin, both of the Ontario Bar, with extensive experience representing unions and employers, respectively, before boards of arbitration.

The Committee has presented its recommendations to me and I have asked officials of the Ministry to review them. I am anxious to have the views of the users of the present arbitration system, and will be receiving written submissions on the Committee's recommendations until February 14, 1992.

These should be sent to:

Bob Mackenzie, MPP
Minister of Labour
(Arbitration System Review)
400 University Avenue
14th Floor
Toronto, Ontario
M7A 1T7

Of course, submissions concerning the arbitration system may also be made as part of the extensive consultations with the public regarding options for the reform of the Labour Relations Act.

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I look forward to a period of constructive discussions with a broad range of groups and individuals both on the recommendations of the Arbitration Review Committee and wider reform of the Act.

For additional copies of this report, please call the Office of Arbitration at (416) 326-1300.

Thank you for giving this important matter your time and consideration. I look forward to hearing from you.

Bob Mackenzie
M.P.P. Hamilton East
Minister

REPORT

OF THE ARBITRATION REVIEW COMMITTEE

TO THE

HONOURABLE BOB MACKENZIE, M.P.P.,

MINISTER OF LABOUR

Toronto, Ontario
October 23, 1991

Jacqueline Campbell
Norm Carriere
Kenneth P. Swan, Chair

INTRODUCTION

Pursuant to Terms of Reference dated September 1, 1991, the undersigned were appointed as members of the Arbitration Review Committee. In addition, Mr. Richard Baldwin, and Mr. James K.A. Hayes, members of the Ontario Bar practicing labour law on behalf of management and unions respectively, were appointed as advisors to the Committee. This is our report on the matters set out in our terms of reference, a copy of which is attached hereto for easy reference.

The Committee has met on a number of occasions, with and without its advisors. We have also consulted, individually and as a committee, as widely as possible within the scope of the very short time limits placed on our deliberations. In particular, we have consulted with officials of the Ministry of Labour, the Labour-Management Advisory Committee, and the Ontario Labour-Management Arbitrators' Association.

Our objective has been to identify proposals for change in the present arbitration system to which all of us can subscribe. While each of us might have taken a somewhat different approach, we have been conscious of the value of identifying recommendations that should command the support of both parties to arbitration, and of the arbitrators who serve in that process. Given its vital importance to labour relations in this province, it is our view that changes to the arbitration process ought, as much as possible, to be made on the basis of consensus.

What we propose here is a number of changes to the present system of grievance arbitration under the Ontario Labour

Relations Act. We recognize that, from time to time, more extreme proposals have been made to replace the present system entirely. At one end of the spectrum, from the point of view of government intervention, are proposals for the establishment of a labour court to administer all employment statutes, including the Labour Relations Act, as well as grievance arbitration, through one central body, presumably established, staffed and paid for by government. At the other end of that spectrum are proposals to abandon mandatory arbitration of grievance disputes, and leave the parties to decide whether to adopt arbitration voluntarily, or settle such disputes by the use of mid-term strikes and/or lock-outs.

We have heard no real support for such extreme proposals in the course of our consultations. All of our respondents have indicated that they want arbitration that works better, and not the scrapping of the arbitration system. It is in that spirit, therefore, that we have approached our mandate.

THE ARBITRATION SYSTEM IN ONTARIO

It is important to observe at the outset that there is not one arbitration system in Ontario, nor are there only two, those established under section 44 and section 45 of the Act. There are, in fact, dozens of systems, shaped by the parties to accommodate their own special needs. Within each structure, there are probably as many styles of arbitration as there are arbitrators, responding to a certain extent to the skills and predilec-

tions of the arbitrators themselves, and to a certain extent to the expectations and desires of the parties.

The two paradigm systems, however, are those established by sections 44 and 45 of the Ontario Labour Relations Act. There is also the special provision in section 124 relating to the construction industry, but this provision is not part of our terms of reference.

Section 44 includes the statutory requirement to arbitrate disputes arising from the interpretation, application, administration or alleged violation of the collective agreement. The opposite side of this coin is the prohibition of strikes or lock-outs during the term of a collective agreement, including any statutory extensions thereof. If the collective agreement does not provide for an arbitration procedure, subsection 44(2) provides a clause which is to be deemed to be included in the agreement.

The section further provides for ministerial appointments where a party fails to participate in the appointment procedure, or the parties are unable to agree upon an appointment of an arbitrator or a chair of a board of arbitration. The remainder of the section is an amalgam of jurisdictional extensions and procedural provisions, many of which have been added over the years to reverse the perceived deleterious effect of some decision of the courts on judicial review.

Section 45 was enacted in 1979, but only took effect as then current collective agreements expired and were renewed. It permits either party to a collective agreement to bypass the

arbitration provision in a collective agreement, or imposed by section 44, by applying to the Minister for the appointment of a single arbitrator in accordance with strict time limits. From that point on, the arbitration in general takes place in exactly the same way as it would under a collective agreement or section 44, subject to a requirement for an arbitrator to deliver an oral decision "forthwith or as soon as practicable without giving his reasons in writing therefor", upon the agreement of both parties.

The section also establishes a list of approved arbitrators, constitutes a Labour-Management Advisory Committee to advise the Minister "with respect to persons qualified to act as arbitrators and matters relating to arbitration", and provides that the Minister may appoint a "settlement officer" to confer with the parties and endeavour to effect a settlement prior to the hearing.

In addition to these formal structures, however, the parties themselves have, in many instances, crafted quite different arbitration structures. While section 45 imposes rigid restrictions on the parties, at least until the hearing starts, section 44 permits any process that can reasonably be defined as "final and binding settlement by arbitration", subject to the possibility that the Labour Relations Board may find the procedure or some part of it inadequate pursuant to section 44(2).

The most obvious choice under section 44 is between a sole arbitrator and a board of arbitration. While the model clause now provides for a tripartite board, many collective agreements provide instead for a sole arbitrator. Nevertheless, while

tripartite boards exact a distinct cost in both time and expense of arbitration, nearly half of all section 44 arbitrations still take place before a board, and the percentage has fallen only slightly since 1983. Some unions use arbitration boards for virtually all of their arbitrations, and there is a group of established full-time consultants who mostly sit as nominees, augmented by a much larger number of persons who act from time to time, who have developed close and apparently satisfactory relationships with the parties who have chosen tripartite arbitration.

Beyond this obvious choice, the parties are free to select from an array of options. There are collective agreements which provide for rotating panels of arbitrators and, where tripartite boards are specified, nominees. There are agreements which provide for grievance commissioners, either instead of or in tandem with conventional arbitration. There are "mini-arbitration" systems, expedited systems, referees established for specialized technical cases such as job evaluation or classification, and many other structures. There are also any number of ad hoc solutions in particular cases, such as the use of mediation-arbitration, straight mediation and, in one case known to us, a form of final offer selection.

Such creativity requires not only a degree of imagination, of course, but also the mutual agreement of the parties. When either of these elements is lacking, the default system is the conventional arbitration structure set out in the collective

agreement or, in extremely rare cases, in the model clause in subsection 44(2).

We have set out this description of arbitration in Ontario at some length, although it will be well-known to most readers of this report, to emphasize that any reform of the arbitration system must take into account the diversity of the ways in which that system is used by the parties, and must enhance the flexibility of the system rather than trap it in a straightjacket of procedural requirements.

THE DIMENSIONS OF THE PROBLEM

The consultations which we have carried out during the short time available to us suggest that the present arbitration system is viewed by the parties, the counsel and the arbitrators involved in it with a certain amount of satisfaction and a certain amount of despair. The satisfaction is based upon a perception that arbitration in this province is perhaps the best, overall, of any jurisdiction in the country. Ontario has a large number of arbitrators actively practicing in the field, including many with a national and even international reputation for professional ability. In general, counsel and other representatives of the parties are pleased with the probity and expertise of the arbitrators to whom they present cases, and arbitrators are impressed by the skill and dedication of those who present cases to them.

But this general satisfaction is offset by a despair that the system is not working as well as it should. The shortcomings

of arbitration in Ontario can be roughly characterized under two headings: those shortcomings which are specific to a particular case, particular arbitrator, particular counsel, or particular parties; and the systemic difficulties which affect the system as a whole, or are perceived to be affecting a growing number of cases.

The individual faults of the system are probably impossible to eradicate completely. The participants in the arbitration process, as in virtually any other aspect of life, vary in skill, experience, probity and diligence, and each of these factors may vary for each individual over time. For the most part, such inequalities have a tendency to average out, or to balance each other, so that the system still works relatively well. Our experience is, however, that virtually everyone involved in the arbitration process has a small collection of cherished "horror stories", and the cumulative effect of these bad experiences with a process that is generally working reasonably well has coloured to some extent the view which many participants have of arbitration.

In our recommendations, therefore, our first objective has been to identify the source of these irritants, and to structure our recommendations so as to contain and correct them to the greatest degree possible. To this end, we have tried to provide arbitrators with tools to control some of the excesses of parties and counsel which add to the two main perceived shortcomings of the arbitration system, delay and cost. We have also

tried to provide to the parties assurances that those aspects of the conduct of arbitrators which contribute to these two shortcomings are also addressed.

The other perceived flaws in the arbitration process are systemic in nature. There is a perception that the arbitration process is becoming increasingly complicated, increasingly legalistic, and decreasingly hospitable to the workplace participants, both management and labour, whom is it designed to serve. That the increased complexity is to some extent only a reflection of the increased complexity of work, and of the statutory structure that surrounds employment, is of little comfort to the lay person adrift in a process that appears to be controlled by a set of inaccessible rules and doctrines. Even though those rules and doctrines were expressly developed to further the cause of justice in arbitration, their virtues are often difficult to justify to those who feel they add to the delay and cost of the process.

Perhaps the most commonly heard complaint about arbitration is that "there is no such thing as a one day arbitration any more". Like all conventional wisdom, this complaint is false but contains a significant germ of truth. In fact, some 70% of all arbitration cases which result in an award are completed in one day of hearing. That still leaves, however, 20% of the cases which take two days, and a further 10% which take three days or more to complete.[1] In rough terms, a two-day case will be twice as

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[1] Time has not permitted us to do any independent study, and we have therefore relied for statistical information on four documents. These are: Research Branch, Ontario Ministry of

expensive as a one-day case, but because of the difficulty of scheduling continuation days, about which we shall say more below, it may take considerably more than twice as long to complete.

Moreover, although no directly comparable study is available, it may be inferred from other evidence that the number of cases requiring more than one day of hearing is increasing; a 1980 study of a differently selected sample of arbitrations suggests that more than 90% of the cases in that year were completed in one day.[2]

Our second objective in formulating our recommendations below, therefore, has been to "change the culture" of grievance arbitration in Ontario - to address the systemic delays in arbitration both by providing procedural recommendations to expedite the arbitration process, and by attempting to change the way in which all of the participants look at arbitration. In other words, it is our hope that our recommendations will provide both the means and the will to bring grievances to a speedy and

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Labour, Grievance Arbitration Cost and Time, 1980, January 20, 1983; Office of Collective Bargaining Information, Ontario Ministry of Labour, Grievance Arbitration Awards in Ontario, 1990, August 1991; Office of Collective Bargaining Information, Ontario Ministry of Labour, A Comparison of the Findings Between the 1990 and 1983 Grievance Arbitration Awards in Ontario Reports, August 1991; and Ontario Labour-Management Arbitrators' Association, Ontario Labour Arbitration Awards Statistics, September 1989 - February 1990, Ellen E. Mole, May 1, 1991. In addition, we have had access to internal statistical analyses of arbitration cases prepared for United Steelworkers of America, District 6 by Mr. Carriere. These studies are all based on different samples and use different methodologies, but they are in general agreement on the points which we make in this report.

[2] Research Branch, Ontario Ministry of Labour, Grievance Arbitration Cost and Time, 1980, January 20, 1983, page 4.

satisfactory resolution whenever possible.

A CODE OF ETHICS FOR ARBITRATORS

A key aspect of our recommendations is the formulation of a code of ethics for arbitrators. Just as we are concerned to enhance the control arbitrators have over the arbitration process to avoid delays and cost, we are concerned to enhance the degree of control arbitrators have as a profession over the conduct of their colleagues, and thus the resort the parties have to protest misconduct. While our recommendation for a code of ethics for arbitrators is designed to remove some of the irritants which we perceive to be souring the way participants look at the arbitration process, it is also designed to further our desire to change the culture in which arbitration is practiced.

There is some precedent for a code of ethics for arbitrators. In the United States, the National Academy of Arbitrators, a voluntary professional organization, developed a "Code of Ethics and Procedural Standards for Labour-Management Arbitration" in conjunction with the American Arbitration Association, a private non-profit appointing agency, and the Federal Mediation and Conciliation Service, a public appointing agency. The first Code was approved in 1951. This was superseded in 1974 by a "Code of Professional Responsibility for Arbitrators of Labour-Management Disputes", since amended from time to time.

Similarly, there are two "codes de deontologie" covering arbitrators in the province of Quebec, one promulgated unilaterally

by a government body, and another developed by a voluntary arbitrators' association. Apparently no other province in Canada has developed such a code. Many Canadian arbitrators, including a score or so of Ontario arbitrators, are members of the National Academy of Arbitrators, and are thus bound in honour to the NAA code.

We think it is time that such a code be developed, and we think the proper way to develop it is in consultation between the arbitrators and the appointing agency, the Minister of Labour. Since the Minister is advised on such matters by the Labour-Management Advisory Committee, and since the statutory functions of the Minister are administered by the Office of Arbitration, it seems likely that these are the appropriate sources of representatives of the Minister's interest, while the Ontario Labour-Management Arbitrators' Association appears to be the appropriate representative of the arbitrators' interest. Since the Advisory Committee is formed of representatives of the parties, their interests would also be protected in such a joint exercise in articulating the standards for professional conduct of arbitrators.

We wish to observe, despite the importance of the proposal to our recommendations, that we doubt that unethical conduct among arbitrators is a serious problem. Our purpose is not to provide a vehicle to seek out unethical conduct, but rather to create an atmosphere in which arbitrators think about the range of ethical considerations which affect their relationships with the

parties, and encourage even more ethical conduct by themselves and their colleagues than the high standard to which most of them already adhere.

> **WE RECOMMEND** that a code of ethics for arbitrators be developed by the Ontario Labour-Management Arbitrators' Association in consultation with the Labour-Management Advisory Committee and the Office of Arbitration, including but not limited to the specific matters discussed in later recommendations.

REMEDIAL MEDIATION

Our terms of reference ask us to consider whether there are any pre-grievance mediation services which could be provided to the parties in order to prevent grievances. Because of our own involvement in the arbitration process, we have collectively relatively little experience with the Ministry's current programs and we have received virtually no proposals for change in this area in the course of our consultations. Our understanding is that the Ministry has offered a number of general programs aimed at improving labour relations generally. The Ministry also has had, over the years, direct involvement in particular collective bargaining relationships in response to a perception that a relationship required assistance.

We doubt that there are any specific recommendations which could be formulated in this area. Every collective bargaining relationship is different, and every particular instance of breakdown of that relationship requires individual analysis and a customized response. Moreover, the science of designing dispute

resolution systems is still in its infancy,[3] and the best results are probably still achieved by the process of educated trial and error.

Nevertheless, it appears to us to be of value to make available resources in the area of mediation beyond the resolution of particular grievances. Where a collective bargaining relationship is producing an undue number of grievances, it is likely a misuse of Ministry resources to deal with the grievances only on an ad hoc basis. Such a situation might be identified by the parties, by grievance mediators, or by conciliation officers involved in collective bargaining disputes. In such circumstances, the Ministry might find it more efficient to engage in intervention mediation to assist in resolving a large backlog of grievances, or in preventive mediation to get at the underlying problems in the relationship which have led to the apparent breakdown of the relationship.

We are not sure to what extent the Ministry is now able to respond in this way, but our impression is that its willingness to do so is generally less well-known in the community than it should be. The most effective recommendation which we feel able to make, therefore, is for the wider dissemination of information relating to such programs among those who might be expected to require such services.

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[3] See, generally, Ury, Brett, Goldberg, Getting Disputes Resolved (San Francisco: Jossey-Bass, 1988).

WE RECOMMEND that the availability of Ministry programs to improve labour relations in general be enhanced, and that mediation services beyond ad hoc grievance mediation be available to assist in dealing with relationships producing large numbers of grievances.

WE RECOMMEND that such Ministry programs be advertised widely to the labour relations community, and that the Ministry's information programs include regular re-advertising of the availability of such services.

RESOLUTION OF GRIEVANCES WITHOUT A HEARING

Our terms of reference pose a number of questions in relation to disposing of grievances through mediation, through brief hearings, or through mediation by the arbitrator at the hearing. We respond to all of these questions in our recommendations, although not always in the order or under the heading set out in the terms of reference.

A. Grievance Mediation

At the moment, section 45 of the Act provides that the Minister may appoint a settlement officer to confer with the parties during the 21 day period between the application for an arbitration under this section and the date established for the hearing. In fact, the Ministry has made grievance mediation services available under section 45 in most cases where such services have been requested. In some cases, scheduling problems have made it impossible to provide a mediator prior to the scheduled hearing date, or for the parties to meet with a mediator provided; in other cases parties have simply declined to become involved in grievance mediation.

In addition, upon request of the parties, the Ministry has made available grievance mediators in non-section 45 cases. Because priority is assigned to section 45 cases, there is sometimes a delay before a mediator can be assigned, but our understanding is that the Ministry's objective is to respond favourably to as many of these requests as possible.

The Ministry has taken to describing the "settlement officers" specified in the Act as "grievance mediators", having regard to the precise nature of the role played by them. It is clear from our discussions with representatives of the Ministry's officers now engaged in this capacity that the process often goes beyond a "settlement" of the specific grievance, and that underlying issues are often addressed regardless of the merits of the formal grievance submitted. In short, the term "grievance mediator" probably better describes the role which these officials play, and the role which, from our conversations with them, we understand that they wish to play in the labour relations process. We would support an official renaming of this position, and we also support the Ministry's firm view that the role should continue to be one of pure mediation, without any additional normative functions in the settlement of grievances such as have been recommended elsewhere.[4]

The grievance mediation program has been, we think it is fair to say, wildly successful. Both under section 45 and in

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[4] E.g. in Report of the Labour Representatives to the Labour Law Reform Committee of the Ministry of Labour (Ontario), April 14, 1991, pp. 86-90.

voluntary mediation under section 44, the success rate in finding a satisfactory resolution to grievances is around 80%.[5] While we recognize that resources are a problem in the present economic situation, we think it is a sound policy choice to put more resources into demonstrably successful programs. That is particularly so where the program results in a resolution of disputes through voluntary settlement, universally recognized as a far better resolution mechanism than adjudication before an arbitrator.

Proposals have been made that grievance mediation should be mandatory. For two reasons, we do not support such proposals. First, mandatory mediation is in many ways a logical contradiction. If either party to a dispute is unwilling to consider a mediative solution, mediation is likely to be doomed to failure from the outset. Mediation requires initial commitment and ongoing cooperation from the parties if it is to work, and while there may be the odd case in which externally imposed mediation might succeed in overcoming initial reluctance to cooperate, the much greater likelihood is that valuable and scarce resources would be wasted where the parties do not voluntarily enter upon the process.

The second reason for not recommending mandatory mediation is the straightjacket in which it would place the Ministry. Because there can be no control over the number of requests for mediation received, and incomplete control over the mediation resources available at any one time, the effect of

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[5] Information received from the Office of Arbitration, Ontario Ministry of Labour.

mandatory mediation would be to spread resources far too thinly in circumstances of excessive demand. It is better, in our view, to allow the Ministry to retain the flexibility to allocate resources to where they are most likely to be successful, rather than to have to reduce the time available to each dispute in response to a statutory mandate to mediate in every dispute. Nevertheless, we think it is vitally important that the resources available for this program be maintained, and to whatever extent possible, given economic realities, be enhanced.

> **WE RECOMMEND** that the Ministry seek to provide sufficient resources to the grievance mediation program to permit the assignment of a grievance mediator in every case where both parties request a mediator, in every case where one party requests a mediator and the other party takes no position, and in every discharge or termination case where a Ministerial appointment is requested, except where both parties expressly object. The resources supplied should also be sufficient to ensure that, in section 45 cases, a grievance mediator may be assigned to meet with the parties prior to the appointment of an arbitrator.

We have recommended a heavier emphasis on discharge and termination cases because we recognize that these are the cases that often involve the greatest hardship to individuals when they are not expeditiously resolved. As resources become available, we think that it is worth the risk of the occasional fruitless appointment of a grievance mediator over the objection of one party in these cases, even if it is not an economical use of resources for grievances in general.

As we have already observed, there have been suggestions that grievance mediators should be involved in normative resolution

of some disputes, particularly discharge or termination disputes, in the role of a "grievance review officer" who may make an interim order for resolution of the dispute. Because it appears to be contemplated that this process is to be performed by Ministry officials, probably those already involved in the grievance mediation program, we are unable to recommend it. We think that the mixing of the mediative and adjudicative roles is not appropriate in circumstances where the person exercising both roles together is not able to effect a final and binding resolution, and is not proper where the interim resolution will probably be given without most of the usual procedural protections. The likely result will be to diminish the trust of the parties in mediation, and lower the effectiveness of the program.

Instead, we have attempted to identify a number of ways in which interim resolution of issues between the parties may be dealt with, and in which more expeditious disposition of some cases may be possible, through the use of arbitrators.

There have been suggestions that the time limit for the appointment of an arbitrator under section 45 of the Act should be extended to allow greater access to mediation services. The usual suggestion is that the time limit be increased to 28 days. While we understand the reason for this proposal, we think that it would be, in all the circumstances, a retrograde step to lengthen the time involved in the section 45 procedure. The major concerns which have prompted this review include a concern about delay, and we are simply not able to recommend anything which would, where

mediation was unsuccessful, lead to a further delay in the expedited arbitration procedures set out in the Act. To do so would dilute the section 45 process in a way which we think would be unacceptable to most of the parties who use it.

It would be possible, of course, to couple such a recommendation with a reduction of the minimum period after filing a grievance after which a request for a section 45 arbitrator may be made. These limits are already quite short, and any further reduction would have the effect of reducing unacceptably the time during which the parties may use their own negotiated grievance procedure to bring their mutual attention to bear on the issues arising from the grievance.

We have also considered the possibility that the 21 day time frame in section 45 could be increased only in those cases where a mediator is to be appointed; unfortunately, we are not in a position to evaluate the administrative difficulties which this might cause. On the whole, it seems an acceptable compromise to lengthen the time for mediation where mediation has some chance of taking effect, while not permitting such an extension where mediation is not available. We make such a recommendation, however, only in conditional terms.

> **WE RECOMMEND** that, if administratively feasible, the period of time for the appointment of an arbitrator following an application under section 45 be increased from 21 days to 28 days only in those cases where a mediator has been appointed to confer with the parties.

B. Interim Orders and Expeditious Disposition

In a number of our consultations, a need was identified for authoritative pre-hearing resolution of a number of kinds of matters. Our experience is that many parties already apply to arbitrators, once they have been appointed, for such preliminary orders, and it is not uncommon for some jurisdictional issues to be dealt with either by letter or by a conference telephone call prior to the hearing. There are also occasional requests, usually disputed, for production of documents or particulars.

Many of the recommendations which we make below in relation to expediting the hearing process require that there be some formal structure for pre-hearing orders. We have decided to recommend that such a structure be created, and that its use be formalized in the statute or the regulations. We have not always specified whether a particular proposal ought to be achieved by statutory amendment, or by regulation within the existing regulation power. Obviously, any proposal specifically conferring a new jurisdiction would have to be done by statute, but there may well be scope to implement a great deal of what we are recommending simply by exercising the regulation-making power which the Minister now has.

Because these orders or directions are preliminary in nature, it is necessary to specify that there should be a right of reconsideration of any of them should the arbitrator make such an order on an interim basis and subsequently be persuaded that the order was unjustified when full evidence and argument is available, or should the arbitrator be persuaded that the circumstances that

justified the making of the order originally have since changed.

> **WE RECOMMEND** that arbitrators be given an express statutory discretion to issue interim awards, orders or directions prior to convening any formal hearing, provided that sufficient opportunity is given to each party to make its submissions in respect of the exercise of such discretion. Such a discretion should be subject to an express power of reconsideration.
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> **WE RECOMMEND** that express recognition be given to arbitration hearings, whether preliminary or final, by conference telephone call, or in writing.
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> **WE RECOMMEND** that arbitrators be given an express statutory discretion to order pre-hearing production of documents and to order the delivery of particulars.

The difficulty in the process which we are recommending is that there will be occasions, of what frequency it is impossible to say, when there will be a need for a preliminary application to an arbitrator but no arbitrator has yet been appointed. In section 45 cases, that may be the situation up until ten days or so before the hearing. In section 44 cases, there may be an even longer period during which there will be no arbitrator seized of the merits of a particular grievance. Similarly, there will be occasions when an arbitrator who is seized is unavailable, for whatever reason.

As a consequence, we have decided that there is a need for a system of duty arbitrators, available on a regular day or days in each week, to whom applications may be made by motion on 48 hours notice. Because they will be dealing with interim applications, sometimes on the basis of relatively little formal evidence or argument, duty arbitrators should be seasoned arbitra-

tors who have gained experience and mutual acceptability. Our consultations with the Arbitrators' Association indicate that such arbitrators could be found who would be willing to staff such a program.

This program could be established at no direct cost to the Ministry. Duty arbitrators could be paid by the parties on an hourly basis for applications actually heard and disposed of. Given a requirement of 48 hours notice, a duty arbitrator would know two days before a scheduled duty day whether or not there were matters to be resolved, and we think that sufficient experienced arbitrators would be willing to commit enough days on this basis to staff such a structure.

It would be necessary to provide a central secretariat for duty arbitrators, and probably a fixed place for hearing, in order to ensure that no undue complications arise. In practical terms, at least in the beginning, the Office of Arbitration is the most appropriate place for delivery of notices and coordination of hearings, and the Ministry's offices in Toronto is the most appropriate place for such hearings to take place, to the extent that they cannot be done by conference call or in writing.

> **WE RECOMMEND** that, where no arbitrator has jurisdiction over a particular grievance, or where the arbitrator having jurisdiction is not available, express statutory jurisdiction to grant interim awards, orders or directions be conferred upon a duty arbitrator sitting on a weekly basis. The orders of a duty arbitrator should be subject to reconsideration before that arbitrator, another duty arbitrator, or an arbitrator having jurisdiction over the merits of the grievance.

The existence of such a system, which at least in the beginning would not likely be fully utilized, would also provide the opportunity for a resolution of other matters on a relatively speedy basis, where those matters can be dealt with in writing, or by brief submissions in person or by conference call. Such a system thus provides an alternative to either of the existing statutory arbitration systems which may, once the parties become used to it, permit significant reductions in hearing time for more straightforward cases.

> **WE RECOMMEND** that parties to a grievance be allowed, by consent, to place straightforward matters not requiring a lengthy hearing before duty arbitrators for resolution, so long as priority is given to applications for interim relief.

We have not been able to agree among ourselves as to whether our terms of reference include a proposal which has been made elsewhere for a statutory "justice and dignity" clause, which would provide for reinstatement of grievors in some discharge and termination cases pending a final resolution of the merits of the grievance before an arbitrator. We are also not able to agree among us on the merits of such a proposal. We think it is fair to observe, however, that the structure for preliminary orders and for the availability of duty arbitrators which we have proposed has inherent in it the possibility that a party may ask, in a particular discharge or termination case, for an order of interim reinstatement. Where parties have negotiated a "justice and dignity" clause, or if such a statutory provision should be

enacted, the details of such a provision would presumably be controlling in relation to any such application. Even where there is no such formal instrument, however, it is at least open to the union to make an application for the discretionary exercise of an arbitrator's jurisdiction where, in a particular case, the facts and circumstances appear to justify such an approach. Undoubtedly such applications will be made, and arbitrators will eventually develop a jurisprudence against which such applications may be measured.

EXPEDITING THE HEARING PROCESS

A. Scheduling

Our experience and consultations suggest to us that the difficulties in scheduling cases are often more the result of a lack of information, and possibly imagination, than any systemic difficulty. We know of parties who are able to expedite hearings under their collective agreements without resort to section 45 by use of any number of mechanisms. In particular, many parties are able to agree on a date for the hearing prior to selecting an arbitrator, following which they take the availability of arbitrators on that day into account as one of the criteria for selection.

At the moment, a substantial number of section 45 applications are being withdrawn by the parties in favour of what has become known as a "special appointment", pursuant to which the Ministry appoints an arbitrator on a specific day acceptable to the parties outside the section 45 time limits. The availability of

more information about which arbitrators are free on any particular day could significantly reduce the use of the special appointment process, which is a sometimes inelegant compromise between section 44 and section 45.

In our view, the best way to achieve this is to create a data base of arbitrators' available hearing dates for at least four months in advance, and preferably for a much longer period. Such a structure would require a process for regular updating as new information is received from arbitrators, and for confirmation with an arbitrator directly prior to an appointment or a selection to ensure that, for whatever reason, he or she had not become unavailable.

Such a structure would also permit the Ministry to have a much better source of information for section 45 appointments, especially where multiple hearing days are involved, an issue to which we will return below. It would permit the parties to conduct their own "special appointment" process, and would permit them a degree of choice among arbitrators on the days acceptable to them both. It would also permit the parties to engage in multi-day scheduling of a hearing, to whatever extent possible, by comparing dates available to them and their representatives with dates available to arbitrators over the near future.

> **WE RECOMMEND** that the Ministry create and maintain a data base of arbitrators' available hearing dates for at least four months in advance, with provision for the data base to be regularly updated and for available dates to be verified prior to appointment and selection.

WE RECOMMEND that parties be given reasonable access

to the information in this data base to permit them to engage in their own scheduling of either single day or multi-day arbitrations based upon the availability of an acceptable arbitrator, and that the Ministry be prepared to provide a panel of arbitrators upon the request of the parties based upon the arbitrators' availability for a specified hearing day.

Perhaps the most intractable problem in relation to scheduling is the difficulty of scheduling continuation hearing days, either under section 44 or 45. When only one hearing day is scheduled but a second day is required, the effect is to vitiate the expedited nature of section 45 arbitration, and to extend significantly the length of time required to complete all other arbitrations.

Many parties deal with this issue by attempting to decide in advance how many hearing days will be required, and making their appointments of arbitrators based upon that estimate. While our experience is that such estimates are notoriously unreliable, they are nevertheless probably better than no estimate at all.

Such an estimate from the parties would permit the Ministry to preschedule as many hearing days as estimated before the same arbitrator in the initial appointment under section 45, and could permit the Ministry when making an appointment under section 44 to consider the availability of the arbitrator for continuations. The ultimate application of such a system will be a matter of administrative practice. We observe that, under section 45, scheduling of hearing dates on consecutive separate days some weeks apart could significantly reduce the possibility of multiple cancellation fees if such a matter settles at or prior

to the first hearing day, and will probably make it easier for parties retaining counsel to find a representative who can accommodate the days as scheduled. On the other hand, where consecutive days are requested or indicated, the availability of information in the data base referred to above may make it possible to schedule hearing days in that fashion as well, thus leading to a quicker overall resolution of the dispute.

Finally, we have dealt with the question of scheduling subsequent days on the basis that all persons involved are acting in good faith and with diligence. We recognize that this is not universally the case, although exceptions are probably rare. We think, therefore, that it is appropriate to provide arbitrators with jurisdiction to fix dates, upon reasonable notice, in order to deal with cases which might otherwise amount to an abuse of the process.

> **WE RECOMMEND** that parties applying for the appointment of an arbitrator by the Minister under either section 44 or 45 be required to provide an estimate of the number of hearing days needed to complete the hearing, and that where possible the Ministry should attempt to preschedule as many hearing days as estimated before the same arbitrator in the initial appointment.
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> **WE RECOMMEND** that arbitrators have jurisdiction, following consultation with the parties, to fix hearing dates, on reasonable notice, where necessary either to commence or continue a hearing.

ISSUING THE AWARD

The statistical data which are available suggest that the length of time between the completion of the hearings and

issuing the award is not, perhaps to the surprise of many participants, a general problem. While the average length of time to issue an award following the hearing seems to have increased over the years, the median length of time is around 21 days or less for sole arbitrators,[6] a period which seems entirely acceptable. The average length appears to have been increased at least partly by the fact that more arbitrations require multi-day hearings now than previously, thus further reducing the control which an arbitrator has over his or her schedule, and adding significantly to the length of time required to review the evidence and prepare the award.

Section 45 now requires that an arbitrator give an oral award at the close of the hearing, or as soon as practicable thereafter, if agreed by both parties. Our understanding is that such requests are virtually never made. It has been recommended elsewhere that an arbitrator be required to give an oral award within 48 hours.[7] We are unable to concur in this recommendation.

Virtually all arbitrators to whom we have spoken have indicated that there is sometimes the need for the discipline of writing the award before the actual outcome becomes perfectly clear. Speedy awards may simply rush justice, with both the perception and the reality that the justice may be less than the parties deserve. Similarly, oral awards are extremely difficult

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[6] Only the Arbitrators' Association statistical survey reports median times, but this figure seems to be borne out by the United Steelworkers of America, District 6 statistics.

[7] Report of the Labour Representatives, supra, p. 89.

to enforce, and will require resolution to writing before parties will be prepared to act upon them.

We do, however, think that it is important that arbitrators have a clear jurisdiction to give oral awards, or brief written awards, at the conclusion of the hearing or shortly after, with full reasons to follow. Such awards may be partial or complete, but should be enforceable in the form in which they are issued even if not complete. In order to avoid the possibility that an arbitrator may be alleged to have exhausted his or her jurisdiction by issuing such an award, there should be a statutory provision that arbitrators remain seized of any grievance until the award is completed and enforceable, and all issues remaining in dispute between the parties have been resolved. Because partial or complete settlements often create similar problems, statutory jurisdiction should be retained in cases of settlement as well until all questions are resolved.

> **WE RECOMMEND** that arbitrators have clear jurisdiction to issue oral or written brief awards at the conclusion of the hearing or afterwards, that such awards may be either partial or complete and enforceable in either form without reasons, provided that written reasons follow within a reasonable time. An arbitrator's statutory jurisdiction should continue until the award or any settlement is complete and all issues between the parties have been resolved.

On the question of timely issuance of awards, while we are satisfied that this is not a general problem, it is clearly a concern to the parties in a significant minority of cases. We think it is reasonable to insert guidelines into the legislation

both to provide an incentive to arbitrators and to provide a process by which the parties may seek assistance in expediting an award. It is important to recognize that arbitrators do not have complete control over their schedules, and that some cases will of necessity have a much higher priority than others. Such a system of expedition must therefore include a certain amount of flexibility and sensitivity, and must permit interaction among the parties and the arbitrator in order to maintain an appropriate relationship among them.

It is equally important that the arbitrator not lose jurisdiction by missing a mandatory time limit, something which can happen for reasons entirely beyond the control of anyone. If the arbitrator loses jurisdiction, the parties are put to even greater delay and expense by having to relitigate the matter before another arbitrator.

We have chosen somewhat different approaches to section 45 from other arbitrations, recognizing that the former is an expressly expedited process designed to produce quick solutions to pressing problems.

> **WE RECOMMEND** that there be a directory requirement for arbitrators appointed under section 45 to issue an award within 30 days of the close of submissions of the parties, the time limit only to be exceeded upon consent of both parties, or for reasons expressly set out in the arbitrator's award.
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> **WE RECOMMEND** that for all arbitrations, where an award has not been issued within 60 days of the close of submissions in an arbitration before a sole arbitrator, or 90 days before a board of arbitration, the Minister be empowered, after consultation with the parties and the arbitrator, to make such order as is appropriate to

> expedite the issuance of the award. The Minister should retain jurisdiction to make further orders as necessary until the award is received.

In most cases, we anticipate that this authority will be exercised simply by inquiring into the reasons for the delay, and securing from the arbitrator a firm estimate of the date of issue of the award, following which the Minister could simply order that the matter be reconsidered after that date. In some cases, firmer measures might be required, and the Minister is given adequate authority by this recommendation to take them. In some extreme cases, for whatever reason, it may be that the arbitrator will be unable to issue a final award. For these cases, another recommendation is required.

> **WE RECOMMEND** that, where appropriate, the Minister should be empowered to replace an arbitrator with another arbitrator pursuant to the Minister's power of review of the timeliness of an award, which other arbitrator shall then have sole and complete jurisdiction over the grievance. Where such an order is made, the Minister should also have jurisdiction to make such an order as to the fees and expenses of the original arbitrator as may seem appropriate in all the circumstances.

We observe that, for the most part, these recommendations are aimed at changing the culture in which arbitrators operate, and setting out in the statutes certain reasonable expectations for delivery of awards. We do not anticipate these time limits will often be exceeded once they have received general acceptance and are placed into operation. The proposal is adapted from a

provision in the Manitoba Labour Relations Act,[8] which we understand is not often used in that province.

Finally, we think that this is a matter appropriate for consideration in articulating a code of ethics for arbitrators.

> **WE RECOMMEND** that the code of ethics for arbitrators include guidelines relating to the timeliness of an award, the expedition of the hearing process, and the requirement to make time reasonably available to parties for pre-hearing issues and for continuations.

C. Changing the Culture

In attempting to come to grips with the problem of the increasing number of hearing days required to deal with some arbitrations, we have asked in our consultations with parties, counsel and arbitrators for their impressions as to the cause of the increase. While we have received many different explanations, it is our sense that a substantial amount of the protraction of arbitration hearings is caused by unpreparedness by the parties to proceed with the arbitration at the outset of the hearing. While this may sometimes be due to negligence, it is in many cases the result of a failure to communicate between the parties on important issues prior to the hearing.

Our proposals to provide for a mechanism for pre-hearing disposition of preliminary or interim matters is designed to allow the parties to come to grips with the issues between them prior to the commencement of the actual hearing. Here, we search for

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[8] R.S.M. 1987, c. L-10, s. 125(4) and (5).

mechanisms to encourage, or even to compel them to do so. Our aim is to change the culture of arbitration so that there is a presumption that the hearing will begin at the date and time scheduled on the merits of the case, without preliminary jockeying. We recognize that it will be impossible to achieve this result in every case, but if all parties act on the basis that the hearing will proceed in this way, we think that some success at least will be achieved.

> **WE RECOMMEND** that, except by consent of the parties or in the discretion of the arbitrator, every arbitration hearing shall commence on the merits of the grievance at the date and time scheduled. Wherever possible, any matters truly preliminary to the merits should be dealt with by pre-hearing motions to the arbitrator or to a duty arbitrator. Where collateral issues are intertwined with the merits, the arbitrator should reserve upon them and determine them along with the merits of the case.

We have used the expression "truly preliminary" to limit the use of this process to the resolution of matters that would otherwise impede or complicate the hearing on the merits. A motion that the grievance is not arbitrable might be preliminary, in the sense that its resolution could avoid a lengthy hearing, but might not be appropriate for resolution without a hearing since it goes to the heart of the case. The arbitrator's judgment will be an important factor in deciding how to deal with such matters, but the possibility of surprise will be reduced by the existence of the presumption.

Our sense of how this recommendation can best be put into operation is that it be made a part of a procedural regulation

dealing with the arbitration process. We recommend below the creation of a rules committee to advise the Minister on the appropriate form of a regulation, which should include this presumption.

The second presumption which we would like to see adopted is that, wherever possible, arbitration hearings should be completed in one day. A great deal of what occurs at some arbitrations is unnecessarily protracting, but the atmosphere of mutual deference among arbitrator and parties is such that only a few arbitrators intervene actively in the way the hearing progresses. Obviously, it is vital that a full and fair hearing be afforded to the parties so that all matters may be resolved in an atmosphere where the parties feel that justice has been done. On the other hand, there is a considerable degree of scope for expediting the hearing where a skilled and experienced arbitrator feels that the culture requires the hearing to be expedited, and his or her jurisdiction both permits and mandates such expedition. Such a jurisdiction will include the notion of getting to the real substance of the dispute, subject always to the requirements of natural justice.

To a large extent, arbitrators can expedite a hearing by engaging in mediative intervention. Probably all arbitrators do some mediation from time to time, and many arbitrators, as they become more experienced, will do more and more of it. Mediation, for example, can often assist the parties in coming to an agreement on some or all of the facts, or in deciding what precise points

need to be the subject of evidence. As well, by suggesting to the parties what might be the outcome of a case if certain facts were to be proved or not proved, an arbitrator can assist the parties in channelling their cases toward a speedy resolution.

The danger in all of this, of course, is the possibility of judicial review. Obviously, arbitrators ought not to be insulated from judicial supervision when they engage in a denial of natural justice, or clearly exceed their jurisdiction, but there is no need for the jurisdiction of an arbitrator to be that of a trial judge, nor is there any need for all of the trappings of judicial detachment (which, we observe, are not always followed in practice even in the courts) in a process which is designed to be speedy, informal and accessible to lay people as well as to lawyers. For that reason, we are recommending that the jurisdiction of arbitrators to be more activist be protected.

> **WE RECOMMEND** that arbitrators be given express statutory jurisdiction to expedite the hearing of an arbitration and to deal with the real substance of the dispute, consistent with giving both parties a fair opportunity to present all necessary evidence and argument in support of their positions.
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> **WE RECOMMEND** that arbitrators be given an express statutory jurisdiction to mediate between the parties on some or all of the issues in dispute, and that arbitrators not lose jurisdiction by reason only of expressing preliminary views on any of the issues for the purposes of assisting the parties in resolving them.

In addition to this statutory initiative, we think it is time that a relatively flexible set of arbitration rules be developed for Ontario, pursuant to the Minister's regulation-

making power under the Act. There are a number of matters which cause some confusion and delay from time to time, and which may at some point result in action in the courts to resolve questions which probably are best resolved by common sense.

To give a few examples, the legislation now provides that arbitrators may issue subpoenas in the same manner as the courts. What that means is rather poorly understood, and the practice varies from arbitrator to arbitrator. Issues have arisen around the form of subpoenas, the validity of subpoenas when sent by fax, the propriety of the arbitrator authorizing another person to sign a subpoena on his or her behalf, and the party responsible for the costs of responding to a subpoena.

Similarly, we have heard from a number of participants in the arbitration process some excellent suggestions which might well speed up arbitration proceedings, but which require a great deal more discussion and interaction than has been possible so far. For example, we have heard suggestions for pre-hearing disclosure, such as requiring the parties to exchange a brief statement of the issues in the case as each of them sees them, including the points which will be argued. Another form of disclosure would be to require all documents to be served on the other party in advance, on pain of not being permitted to enter them into evidence at the hearing, at least without leave of the arbitrator. A third level of disclosure would require the evidence of all witnesses to be put in writing prior to the hearing, and to be exchanged between the parties. If any party requires to cross-examine an opposing

witness, the witness would simply be asked to swear to the truth of the written statement, and then immediately be put up for cross-examination.

Whether such proposals are wise additions to the general arbitration process, or whether they might be appropriate for an alternative, expedited process to which the parties could subscribe on consent, it is our view that all of these points are worthy of further discussion. We think that a procedural regulation under the Act is the appropriate way to deal with these matters, and that a rules committee is the appropriate body to advise the Minister on how to proceed.

> **WE RECOMMEND** that a rules committee be established to advise the Minister on a procedural regulation for arbitrators. The committee should be advised by representatives of arbitrators and counsel. The committee should report through the Minister's Labour-Management Advisory Committee.

Finally, we think that this is an appropriate matter to be placed before the arbitrators in a manner likely to encourage them to take seriously the new jurisdiction which we have proposed, and to exercise that jurisdiction confidently, and to conduct themselves in accordance with its spirit.

> **WE RECOMMEND** that a code of ethics for arbitrators include guidelines relating to an arbitrator's obligations to the parties in relation to the length of time of availability on scheduled hearing days, and in relation to a general obligation to expedite hearings consistent with the requirement of justice.

There is another, somewhat different, proposal which has

been made elsewhere[9] which we are also prepared to support, simply because it involves an overall saving in time and cost to parties to collective agreements, even though it achieves those savings outside the arbitration process itself. It has been proposed to confer on arbitrators a statutory jurisdiction to grant remedies under public statutes relating to the employment relationship. Arbitrators already have an acknowledged authority to interpret such statutes in the course of applying the collective agreement to a particular set of facts, but are sometimes stymied by a lack of jurisdiction to grant a complete remedy, for example where a part of the remedy appears to be within the jurisdiction of an Employment Standards Officer, or the Human Rights Commission. Where an arbitrator already has jurisdiction over the subject matter of the dispute by reason of a grievance, it seems unreasonable and unduly technical to allow an arbitrator to identify a breach of a general public statute, but to be unable to correct it as between the parties to the collective agreement.

> **WE RECOMMEND** that arbitrators be given an express statutory jurisdiction to interpret and apply legislation relating to the employment relationship in the context of the interpretation, application or administration of the collective agreement, and to grant remedies under such legislation.

We recognize that this recommendation is only the tip of

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[9] In K. Swinton and K. Swan, "The Interaction Between Human Rights Legislation and Labour Law" in K. Swan and K. Swinton, Eds., Studies in Labour Law (Toronto: Butterworths, 1983); related recommendations are also found in Report of the Labour Representatives, supra, pp. 84-85.

a legislative iceberg. In addition to conferring such authority on arbitrators, it will be necessary to harmonize arbitral jurisdiction with the other statutory jurisdictions to ensure that multiple proceedings are avoided but complete justice is done.

FEES

The cost of arbitration remains a perennial issue for discussion in the context of reform of the arbitration system. Most of our consultations and discussions have related to arbitrators' fees, but it is important to recognize that this is only one component of the cost of arbitration. A 1980 Ministry study on costs suggested that arbitrators' fees make up only half of the costs to unions of arbitration where a sole arbitrator is used, and only 38% where a board of arbitration is used. Moreover, this is an area where the dimensions of the problem do not seem to have changed significantly in the last decade; fees seem to have kept pace generally with costs of other services since the 1980 study was done. Moreover, anecdotal evidence suggests that fees in Ontario are not out of line with other provinces.

Our own experience and our consultations suggest that there are several levels to the concern about arbitrators' fees. The first is in relation to the overall cost of arbitration, and is thus concerned as much with the need to complete hearings more quickly as with the level of fees charged by the arbitrator. To a certain extent, our efforts to identify ways to restrict hearings to a single day, and to provide for more informal resolution of

disputes, address this issue as well.

Concern is also expressed, however, about specific alleged excesses by particular arbitrators in particular cases. While occasionally these take the form of complaints that an arbitrator's fees are just too high, they more often deal with disputed items of expenses, the use of overhead or administration fees, and in particular cancellation fees.

Most arbitrators in this province charge fees on the basis of a block fee for scheduling and attending a hearing, and preparing and issuing an award. The origin of the block fee is not entirely clear, but it seems to have been designed to allow parties to predict in advance how much an arbitration would cost them, regardless of complexity, provided that it could be completed in one day. The block fee has great advantages to the parties, but is capable of being misunderstood and misrepresented from time to time. Obviously, where parties choose to present only one straightforward case on a hearing day, the fee may appear to overcompensate the arbitrator for that particular case. From the arbitrator's point of view, however, any such overcompensation is balanced by the fact that much more difficult cases are charged on the same basis on other days, thus resulting in a degree of undercompensation from other parties.

Despite its hallowed history in this province, the block fee is not generally used across the country, and several Ontario arbitrators have in fact departed from it, especially some who have had earlier experience in other provinces. Most arbitrators across

Canada charge for their services on an hourly (or per diem) basis, where the time spent at the hearing and the time spent in preparing the award and in ancillary functions is separately detailed and charged on an hourly or daily basis. This also appears to be the way in which most commercial arbitrations are billed. This has the advantage of relating the amount of the fee more directly to the complexity of the case, but of removing virtually any predictability for the parties of what will be the final cost of an arbitration.

Cancellation and settlement fees also provide the opportunity for a degree of misunderstanding. To the parties, a cancellation fee is paying an arbitrator for doing nothing; from the perspective of the arbitrator, parties who have tied up a day for a considerable period of time, only to cancel at the last minute, have cost the arbitrator the opportunity to schedule, hear and decide another case, for a full fee, on that occasion. Once again, the difference in perspective is important. Parties see only the single case which the arbitrator does not have to hear and decide; arbitrators see the cancellation in the context of their entire schedule, and the need to cover overheads on a day on which they have been prevented from working. Because the percentage of cancelled arbitrations is very high, although it varies from one collective bargaining relationship to the next, this misunderstanding often has a very high profile.

It is of interest that, while there is a great deal of complaining about the fee structure both by parties and by

arbitrators, there has been relatively little discussion of it. Some time is apparently spent in the Arbitrator Development Program on billing, but there has been no general input to that program by the arbitration community at large. Remarkably, very few parties, even those with a substantial arbitration calendar and thus, at least apparently, considerable bargaining power, have ever attempted to negotiate fees directly with arbitrators in advance. The Arbitrators' Association has apparently felt constrained from open discussion of normalizing fees by the possibility that this might be in breach of federal competition legislation; whether this fear is well-founded or not we do not know.

For several years now, the Arbitrators' Association has offered a Fees Mediation Service to parties wishing to raise concerns about a particular fee charged by an arbitrator. The service is offered free, and involves at the first stage mediation by a panel of two mediators selected in rotation from a list of volunteer senior arbitrators. If mediation is unsuccessful, the party or parties complaining and the arbitrator may agree to constitute the mediation panel an arbitrator pursuant to the Arbitrations Act to give a binding determination of the issue. If there is no agreement for arbitration, either of the disputants may request the panel to issue an advisory opinion. In either case, the panel gives an unanimous decision. The service seems to have been relatively successful over the years, but it has been relatively little used, and our consultations suggest that many participants in the arbitration process have not even heard of it.

In fact, it was advertised in the Ministry's Monthly Bulletin when it was first inaugurated, but the absence of any official publication since that time has meant that it has been advertised since only by word of mouth. We are informed that the Office of Arbitration brings the service to the attention of any party raising concerns about billings to the Office. We do not know how many actual applications to the Mediation Service result from such referrals, and how many complaints are just dropped.

The most obvious, and most drastic proposal for resolving the ongoing concern about fees is for the Minister to fix fees by regulation. The regulatory authority to do so appears to have been available under the Act since 1979, but has never been used. The arguments for using it are advanced from time to time, particularly in relation to section 45 where, as unions in particular point out, the parties have no choice over which arbitrator is to be appointed, and are therefore unable to make any advance prediction of the cost of the arbitration.

Use of this regulatory power would be almost unprecedented either in this province or across Canada. There appears to be no other precedent for fixing a fee to be charged by a professional in private practice to clients, although there are some precedents for controlling billing practices by some review process, such as the taxing mechanisms available for reviewing legal bills.

In Ontario, arbitrators' fees are fixed when paid by the parties only where a grievance arbitrator is appointed by the

Solicitor General under the Police Act. Across Canada, only two provinces appear to have done anything in relation to arbitrators' fees. In Nova Scotia the Ministry of Labour pays one-third of all arbitrators' bills, and that notional one-third has recently been capped. In practice, it appears that arbitrators and parties have not treated this as imposing any cap on the overall arbitrators' fees and in fact the government's "third" has simply shrunk as a proportion of total fees charged.

Only Quebec appears to have established a fixed schedule of fees. It is fair to say that this has been a matter of ongoing concern. The fees are unrealistically low, making it extremely unprofitable to practice as a full-time arbitrator and cover overheads. It has had the effect of driving many arbitrators who are in demand away from accepting arbitrations under the regulated fee. Parties regularly offer overpayments to induce more experienced arbitrators to take particular cases. The Conseil du travail et de la main-d'oeuvre, the equivalent of Ontario's Advisory Committee, has recognized this failure in its 1989-90 list of arbitrators, which creates a status of arbitre desengage, who is not bound by the fee schedule where mutually selected by the parties.

There are a number of areas in the public sector in Ontario where fees are fixed by the government, but these are almost universally fees which are paid by the government as well. The experience in these sectors is essentially along the same lines as the experience in Quebec, as is the experience under the Police

Act described above.

The Arbitrators' Association has expressed its unease about any proposal to fix fees, while recognizing that there are legitimate concerns about billing levels and practices. Specifically, the Association observes that attracting new arbitrators to the profession is an important aspect of maintaining the quality of the present system, just as is retaining the experienced and acceptable arbitrators who are already operating in the system. A new arbitrator faces a lengthy period of development and exposure, at the end of which he or she will be assessed on the basis of acceptability to the parties. While Ministerial appointments provide the possibility of a certain level of income at the beginning of this process, the new arbitrator takes a significant risk in beginning an arbitration practice that it will not provide a long-term career. Fixing fees, and the possibility that fee levels may stagnate and fall below economic levels, as has happened in virtually every sector where fees have been fixed, deter otherwise promising candidates from embarking on an arbitration career, and may make established arbitrators consider their options for alternative employment, for most the practice of law or senior employment in human resources.

Moreover, the suggestion that fees could be fixed only for section 45, while initially attractive, carries with it the possibility of unfortunate steering effects. The Quebec experience suggests that fixed fees for section 45 will keep experienced arbitrators from offering their services under that provision, thus

adding to concerns already expressed in many quarters, rightly or wrongly, about the quality of arbitrators appointed under section 45.

It has been suggested that fees under section 45 be fixed by a process that would involve negotiation between the Arbitrators' Association and the Minister's Advisory Committee, or some replacement body. In the event of an impasse, the Minister of Labour would then refer the matter to binding interest arbitration. If regulation is contemplated, this is the only way in which we can see it avoiding any of the pitfalls of fixed arbitration fees. While we are not clear on the details of how such a mechanism would operate, it would have the advantage of providing direct involvement of the arbitrators in the establishment of the fees, and would provide a neutral interest resolution process. If the outcome were to be seen as fair on both sides, it would be less likely to cause the problems created by fees fixed in other ways either in the public sector in this province or in the province of Quebec.

Because there are, however, unknown consequences to taking such an action, we are hesitant to recommend it at this point. We observe that the Arbitrators' Association has expressed a willingness to engage in a number of initiatives to normalize fees and billing practices, and we think that these proposals ought to be given a chance to remove the irritants in the system and to permit some rationalization of fees without creating a rigid fixed structure. A primary goal of these initiatives ought to be to

provide parties with some certainty of the range of fees they can expect to encounter when an arbitrator must be appointed by the Minister. We suggest that the effectiveness of these measures be reviewed after one year between the Arbitrators' Association and the Advisory Committee, and that a process for ongoing reviews on a periodic basis be established.

WE RECOMMEND that arbitrators be required by regulation to file a schedule of fees with the Office of Arbitration, to submit accounts only in accordance with the filed schedule of fees, and to provide a copy of those schedules to the parties upon request and upon appointment. Arbitrators should only be allowed to amend fee schedules on 30 days' notice to the Ministry, and to any parties who may be affected by the amendment.

WE RECOMMEND that an arbitrator's recoverable expenses be limited to those which are actual, reasonable and necessary in all the circumstances, or to which the parties have expressly or impliedly consented, and that the Arbitrators' Association be requested to develop guidelines as to what expenses are properly charged to the parties as disbursements, and which are properly a part of the arbitrator's overhead.

WE RECOMMEND that the Fees Mediation Service offered free by the Arbitrators' Association be referred to expressly in the regulation to the Act providing for the filing of schedules of fees, and that information on the service be provided generally to parties involved in the arbitration process, and in particular to any party complaining or inquiring to the Ministry about fees.

WE RECOMMEND that the Arbitrators' Association be asked to develop guidelines as to the reasonable percentage of the arbitrator's usual fee that may be charged for settlements at the hearing, and for cancellations at various time periods prior to the hearing. In the case of section 45, we recommend that the guideline for cancellation be in the form of an established dollar fee, to be reviewed annually, for cancellation of hearings scheduled under section 45 but cancelled prior to the day of the hearing. If difficulty is experienced in achieving compliance with the recommended fee, we think it would be appropriate for the Ministry to make it a condition of accepting appointments under section

45 that the arbitrator will adhere to this guideline.

WE RECOMMEND that the code of ethics for arbitrators include considerations in relation to fair and honest fees for services rendered to the parties, and for reasonable and predictable billing practices.

ARBITRATION COMMISSION

Our terms of reference appear to be restricted to whether the Minister's Advisory Committee as presently constituted should be given an expanded role in labour relations. In our view, it should not. Should advice on wider workplace issues be required, it is our view that other committees should be established. The Committee has gradually been expanding its role from one merely of recruiting and training arbitrators to taking a broader look at the provision of arbitration services, and it is our view that this Committee should not have its attention diluted by assignment of duties outside the role of nurturing the arbitration process.

We do not appear to have been asked for a recommendation about the structure of the Committee, and we refrain from offering advice on this issue. As to the proposal for a quasi-independent arbitration commission, we observe that the operation of such a body prior to 1979 was not entirely without difficulty, and the structure of such an organization should be carefully considered in order to avoid the possibility that similar problems might arise. We observe in passing that there is strong feeling in the community that any committee established in labour relations matters should be a bipartite committee along the lines of those established to deal with occupational health and safety and other

issues.

WE RECOMMEND that the Minister's Advisory Committee continue to expand its role in the monitoring of arbitrators, as well as recruiting and training them. Specifically, we recommend that the Committee:

a) continue to refine the criteria of mutual acceptability which it has already developed and has begun to use as a tool for maintaining a list of currently acceptable qualified arbitrators.

b) participate with the Ontario Labour-Management Arbitrators' Association in developing a code of ethics for arbitrators.

c) participate with the Arbitrators' Association in a structure of education for new arbitrators, and in continuing education for arbitrators already on the Minister's list, in particular in relation to the enhanced mediation role described above.

d) participate with the Arbitrators' Association in developing means for the enforcement of a code of ethics, and in particular the development of relationships between ethical conduct and Ministerial appointments.

e) review with the Arbitrators' Association the effectiveness of the Association's initiatives to rationalize fees under section 45, and advise the Minister accordingly.

CONCLUSION

As we have observed, the recommendations which we make here are those which all of us can support. As individuals, we might have made different recommendations, but we are all satisfied that what we propose is an approach to the problems of arbitration which should be able to command the support of a broad cross-section of those who are interested in the process.

We have not, in the time available, been able to pursue

every suggestion which was made to us; to a certain extent, our proposal for the creation of a rules committee would permit this part of the process, an ongoing review of procedural issues, to continue. It is, in fact, our sincere hope that the review of how arbitration works and how it may be improved will not end with this report, but will become an ongoing exercise in mutual cooperation among the arbitrators, the parties, and the Ministry. Closer and more regular consultation is clearly called for so that the nurturing of the arbitration process does not continue to be a series of exercises in crisis management.

We wish to express our thanks to all of those who have conferred with us, and supplied us with information, in the course of carrying out this review.

TORONTO, October 23, 1991

Jacqueline Campbell
Norm Carriere
Kenneth P. Swan, Chair

September 1, 1991

Arbitration Review Committee

Terms of Reference

INTRODUCTION

Section 44 of the Labour Relations Act requires the settlement of disputes between labour and management in accordance with the grievance arbitration provisions negotiated in the collective agreement. The arbitration board so formulated can either be tripartite or a single chair.

Section 45 of the Act supersedes the negotiated provisions of the collective agreement by allowing either party to expedite the arbitration process, by requiring the Minister to appoint a single arbitrator to hear the matter within 21 days of a request.

Elements of the trade union and employer communities have expressed concern about the growing cost and ever increasing delays associated with the arbitration process.

The increasing costs of arbitration include arbitrator/nominee fees, the parties' counsel, cancellation fees and rental of hearing facilities. All of these costs are increased as litigation becomes more and more lengthy and complex.

Although section 45 of the Act has been very successful in addressing the time delay between the initiation of a grievance and the setting of a first hearing date, it has not proven to be a complete answer to the delays inherent in the arbitration system.

Many cases take more than one day, and the scheduling of the second and subsequent days, often results in the elapse of many months before the case can be brought back on. These gaps between hearing dates also have the effect of increasing the cost of arbitration, as parties must prepare afresh for each new day of hearing. Finally, there is often further considerable delay between the completion of the hearing and the ultimate release of the arbitration award.

The arbitration system was intended to be a quick, informal process by which employees represented by trade unions could resolve their differences with their employers. Over the years, as a result of a number of factors, including increased legal arguments and an increase in the complexity of grievances, grievance arbitration has become anything but speedy and inexpensive. The delays and costs result in frustration and aggravation to all parties to the process and in some cases can cause significant injustice or financial hardship for some or all of the parties concerned.

The delays and escalating costs of the existing system threaten to undermine its ability to effectively resolve workplace disputes in the coming years. A careful examination of the system is required if the arbitration system is to once again meet the needs for which it was designed.

As a result, the Ministry proposes to appoint a committee to inquire into methods and mechanisms to improve the arbitration process.

Scope of Review

In exercising its mandate, the Committee should consider, but not limit itself to, the following issues:

A Grievance Prevention

Are there any pre-grievance mediation or other services which could be provided to the parties in order to prevent grievances?

B Resolution of Grievances Without a Hearing

1) How can the provision of mediation services best be expanded?

2) Are there mechanisms for disposing of certain types of cases, i.e. uncomplicated or relatively insignificant matters, without a lengthy or full hearing?

3) Should the current period for the appointment of an arbitrator under Section 45 of the Act be extended to allow greater access to mediation services?

4) Should the time limit for requesting the appointment of an arbitrator under section 45 be reduced from 30 days after the incident to 21 days (14 days to 7 days in the case of discharges) to allow for earlier access?

5) Should the role of arbitrators as mediators be given recognition?

C **Interim Relief**

With respect to those matters which cannot be resolved without a hearing, should there be a mechanism for interim relief to be made, particularly with respect to discharge or other matters affecting job security? If so, who should make such an order, and on what basis should such orders be made?

D Expediting the Hearing Process

1) With respect to Section 44 arbitration, is there any way in which cases can be scheduled for hearing in a more expeditious manner? For both Section 44 and 45 arbitration, how can the delays between the first and subsequent days of hearing best be reduced? Is block scheduling of lengthy cases feasible?

2) How can delays between completion of the hearing and finalization of the award be reduced? Should arbitrators be required to make oral awards within a given time frame, with reasons to follow? Should time limits be placed on the release of written awards?

3) Can the initial day of hearing be lengthened to encourage completion in one day?

4) Can, and should, arbitrators be given enhanced authority to expedite the hearing process? If so, what particular powers might be given to arbitrators in this regard?

E Cost of Arbitration

Should a fee schedule be imposed under the existing regulatory

power, and if so, should this be on the basis of negotiations with the arbitration community? If not, how would fees be determined? Are there any other ways in which the cost of arbitration can be reduced?

ARBITRATION COMMISSION

Under the current provisions of the Act, the Minister has established a Labour-Management Advisory Committee composed of a Chair and three members from each of the employer and union community. The purpose of the Committee is to advise the Minister on matters related to arbitration. While the current Committee has been effective in recruiting and developing new appointees to the arbitration list, and in ensuring that arbitrators on the list enjoy the mutual acceptability of labour and management, should consideration be given to expanding its role in the selection, training and monitoring of arbitrators and the arbitration process or in providing advice in wider workplace issues?

TIME

The Committee is asked to submit a written report to the Minister

no later than October 23, 1991, recommending any legislation or regulatory changes it considers appropriate. It should be noted that broad regulation making powers under section 116 already exist, and these may be sufficient to incorporate some of the changes with respect to arbitration.

CONSULTATION

Within the bounds of the time constraints, the Committee should consult with representatives of business and trade unions, as well as officials of the Ministry of Labour, the Labour-Management Advisory Committee, and the Ontario Labour-Management Arbitrators' Association.

Report of the Arbitration Review Committee to the Honourable Bob Mackenzie, M.P.P., Minister of Labour.

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